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No.

In the Supreme Court of the United States

DEVIN WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that a jury must find all facts other than a prior conviction beyond a reasonable doubt before a criminal defendant's sentence may be enhanced beyond the statutory maximum. In *Begay v. United States*, 553 U.S. 137, 145 (2008), this Court held that a "violent felony" under the Armed Career Criminal Act's residual clause requires that an offense involve "purposeful, violent, and aggressive" conduct. The questions presented, over which the panel below divided (Posner, J., dissenting) and the lower courts are in conflict, are as follows:

1. Is a criminal defendant's constitutional right to a jury trial violated when a prior nonjury juvenile adjudication is used to increase his term of imprisonment beyond the otherwise applicable statutory maximum?

2. Does vehicular flight from a police officer inherently involve purposeful, violent, and aggressive conduct such that it constitutes a "violent felony" under the Armed Career Criminal Act?

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PETITION FOR A WRIT OF CERTIORARI[1]

Petitioner Devin Welch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 604 F.3d 408. The district court's order denying the petition for a writ of habeas corpus (App., *infra*, 53a-61a) may be found at 2008 WL 2796953.

JURISDICTION

The court of appeals issued its opinion on May 4, 2010. On July 26, 2010, Justice Breyer extended the time to file a petition for a writ of certiorari to and including September 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * * ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1] Counsel was appointed to represent the petitioner under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

18 U.S.C. § 924(e) provides in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony * * * committed on occasions different from one another, such person shall be * * * imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT

This case presents a mature split of authority over two recurring issues that affect a significant and growing number of criminal proceedings. The Armed Career Criminal Act ("ACCA") imposes a 15-year mandatory minimum sentence on felons who unlawfully possess a firearm and have three or more prior convictions for "a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). Without the ACCA enhancement, the statutory maximum sentence for a felon-in-possession offense is ten years. 18 U.S.C. § 924(a)(2). The two questions presented in this case concern the predicate offenses that may be used to increase a defendant's sentence under the ACCA and other similar sentence enhancement statutes.

The first issue is the proper scope of the "prior conviction" exception in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, this Court held that all facts other than a "prior conviction" must be found by a jury beyond a reasonable doubt before a criminal defendant's sentence may be enhanced beyond the statutory maximum. *Id.* at 490. In the decision below, a divided panel, over Judge Posner's dissent, held that the prior conviction exception applies to nonjury juvenile adjudications, and that such adjudications may therefore be used to enhance a subsequent sentence of an adult under the ACCA and other recidivist statutes.

The second issue is the meaning of "violent felony" as interpreted by this Court's recent decisions in *Begay v. United States*, 553 U.S. 137 (2008), and *Chambers v. United States*, 129 S. Ct. 687 (2009). In *Begay*, this Court held that a "violent felony" under the ACCA must not only present a risk of injury to

others, but also involve "purposeful, violent, and aggressive" conduct. 553 U.S. at 145. In *Chambers*, this Court rejected the contention that any form of "escape" is a "violent felony" because of the potential for violent confrontation upon recapture. Yet, the panel majority—again over Judge Posner's dissent—held that vehicular flight from a police officer qualifies as a "violent felony" within the meaning of the ACCA because it challenges an officer's authority and may result in confrontation, thereby satisfying *Begay*'s "purposeful, violent, and aggressive" standard.

The circuits too have diverged over both questions raised in this petition. Review is warranted to resolve these well-developed conflicts and to ensure compliance with this Court's Sixth Amendment and ACCA precedents.

A. Welch's Sentencing And Direct Appeal

Petitioner Devin Welch pled guilty to unlawful possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). Drug task force agents discovered the weapon hidden unloaded under a mattress in his mother's house while executing a search warrant. S.R. 20 ¶¶ 6-7.[2] The agents observed Welch walking with crutches, and he explained that he had been shot in the leg earlier that month. *Id.* ¶¶ 7, 48. As Welch later told the sentencing court, he obtained the gun to protect himself after his assailant continued to intimidate and threaten him. C.A. App. 17-18.

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[2] "S.R." refers to the supplemental record on appeal from Welch's underlying criminal proceedings.

The sentencing court classified Welch as an Armed Career Criminal ("ACC") under 18 U.S.C. § 924(e) based on a finding that he had three prior "violent felony" convictions: (1) a conviction for aggravated battery, (2) a conviction for aggravated fleeing or eluding a police officer, and (3) a juvenile adjudication for attempted armed robbery. Welch's counsel did not raise any objection to the basis for his sentencing, but Welch objected pro se to the use of his fleeing conviction and juvenile adjudication as predicate offenses. The district court overruled his objections.

Welch's offense level and criminal history category ordinarily would have resulted in a sentencing range of 77 to 96 months. The court's decision to classify three of his prior convictions as "violent felonies" automatically raised his minimum sentence to 180 months. During the sentencing hearing, counsel for the government acknowledged that Welch's prior criminal history was "[not] as severe as some others * * * who are armed career criminals," C.A. App. 41, and he accordingly recommended a sentence of 180 months—the bottom of the guidelines range and the mandatory minimum under the ACCA. The sentencing court agreed with the government's recommendation and sentenced Welch to 180 months' imprisonment, to be followed by a five-year term of supervised release.

On direct appeal, Welch, through the same counsel who had represented him at sentencing, did not pursue any of his pro se objections to the use of his prior convictions as ACCA predicates. Instead, he argued that the district court erred by improperly delegating authority to the probation office for drug testing during the period of supervised release. The

Seventh Circuit summarily affirmed the district court's judgment.

B. Petition For Habeas Relief In The District Court

Welch next sought collateral relief in the district court under 28 U.S.C. § 2255.[3] He reasserted his earlier pro se objection to the classification of his fleeing offense as a "violent felony," and he contended that his juvenile adjudication could not be used to enhance his sentence under *Apprendi* because he had not been afforded the right to a jury trial. Welch also claimed that his trial and appellate counsel rendered ineffective assistance by failing to raise any claims regarding Welch's ACC classification.

The district court denied Welch's § 2255 motion on each of these claims. The court held that although the Seventh Circuit had not yet resolved the issue of using a nonjury juvenile adjudication for sentence enhancement, it was reasonable for counsel to have declined to raise the issue where there was a three-to-one circuit split against Welch's position. On the vehicular fleeing claim, although this Court issued its decision in *Begay* while the § 2255 motion was pending, the district court evaluated Welch's argument based on pre-*Begay* case law classifying vehicular flight as a "violent felony" based solely on its potential for risk of injury.

The Seventh Circuit initially granted a certificate of appealability on the question whether Welch was denied effective assistance of counsel due to his failure to raise an *Apprendi* objection to the use of

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[3] Pursuant to Rule 14(g)(ii), petitioner notes that the district court had jurisdiction pursuant to 28 U.S.C. § 1331.

Welch's juvenile adjudication as an ACCA predicate. The court later expanded the certificate to include a challenge to Welch's fleeing conviction based on this Court's decision in *Begay*.

C. The Seventh Circuit's Decision

A divided Seventh Circuit panel affirmed the district court's judgment. With respect to Welch's ineffective assistance claim, the panel majority noted that it need not decide the merits of the underlying *Apprendi* issue under the *Strickland* standard. The court nonetheless decided to address the issue on the merits in the interest of judicial economy. App., *infra*, 33a. Welch's challenge to the use of his fleeing conviction in light of *Begay* was likewise considered entirely on the merits under § 2255(f)(3), which permits a collateral attack on a conviction based on a new and retroactively applicable rule of substantive criminal law.

The panel majority rejected Welch's *Apprendi* challenge to the use of his nonjury juvenile adjudication to enhance his sentence under the ACCA. The court acknowledged the circuit split over the issue, and it sided with the majority view that *Apprendi*'s "prior conviction" exception applies to juvenile adjudications despite the lack of a jury trial right. In the panel's view, "[p]rior convictions are not subject to the *Apprendi* rule if the defendant received all the protections to which he was constitutionally entitled, and the integrity of the fact-finding procedures are thereby ensured." App., *infra*, 40a. Relying on *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), which held that juvenile proceedings do not require a jury trial under the Sixth Amendment, the panel majority concluded that other protections accorded juvenile defendants ensure that their adjudications are

sufficiently reliable to bring them within the scope of *Apprendi*'s "prior conviction" exception.

The panel majority further held that Welch's vehicular fleeing offense was properly deemed a "violent felony" under the ACCA. Here, too, the court acknowledged that the circuits are divided over the issue, App., *infra*, 32a n.21, and it sided with the courts holding that vehicular fleeing involves "purposeful, violent, and aggressive" conduct as required by *Begay* and therefore qualifies as a predicate offense. According to the panel majority, intentionally defying an officer's command is inherently aggressive and violent because it "involves affirmative action," "challenges the immediate authority of the police officer and calls on the officer to give immediate chase[,]" thereby "endanger[ing] others." *Id.* at 30a-31a.

Judge Posner dissented on both issues. App., *infra*, 41a-52a. With respect to Welch's *Apprendi* claim, Judge Posner noted as an initial matter that Welch's juvenile adjudication "was not a 'conviction' at all, because in Illinois as in other states a juvenile-court proceeding * * * is not deemed a criminal proceeding." *Id.* at 43a. He viewed this Court's holding in *McKeiver* that juveniles are not entitled to a jury trial as irrelevant to the constitutional concerns at issue in *Apprendi*. Pointing out that "[t]he constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement," he reasoned that "the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for purposes of recidivist enhancements, to adult convictions." *Id.* at 46a. Judge Posner further pointed to a number of

empirical studies showing that juvenile adjudications often lack the reliability of adult convictions, and that judges are more likely than juries to convict juveniles. "[I]f it is true that juvenile defendants fare worse before judges than they would before juries [then] one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference." *Id.* at 47a-48a.

On the vehicular fleeing issue, Judge Posner disagreed with the majority's understanding of *Begay*'s "purposeful" requirement. He explained that the term should be interpreted to mean "trying to harm a person's person or property" rather than merely acting with specific intent. App., *infra*, 50a. Because vehicular flight does not involve any intent to cause harm to others, he found the offense different in kind from the sample crimes listed in the statute's definition of a "violent felony." Judge Posner also rejected the majority's conclusion that fleeing is inherently "violent and aggressive." He observed that the majority's focus on the fleeing offender's "defiance of authority" conflicted with this Court's conclusion in *Chambers* that "we can't treat all escapes alike." *Id.* at 51a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve The Split Among The Circuits And State Courts Of Last Resort Over The Scope Of *Apprendi*'s "Prior Conviction" Exception.

The federal appellate courts and state supreme courts are openly and intractably split over the scope of a criminal defendant's jury trial rights. The court below sided with courts holding that juvenile adjudications are equivalent to adult convictions for *Ap-*

prendi purposes, despite their lack of a jury trial right, and therefore may be used to increase a defendant's sentence beyond the statutory maximum. That ruling conflicts both with the holdings of other courts and with this Court's Sixth Amendment precedents. This Court should grant review to clarify the meaning of *Apprendi*'s "prior conviction" exception, a recurring issue with enormous implications for the sentencing of many criminal defendants.

A. The Lower Courts Are Divided Over Whether Prior Nonjury Juvenile Adjudications Fall Within The "Prior Conviction" Exception.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court emphasized that prior convictions are a "narrow exception" based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which permitted sentence enhancement based on a judicial finding of a prior conviction.[4] The Court noted that *Almendarez-Torres* was "at best an exceptional departure from the historic practice" of requiring juries to find facts that would expose defendants to more severe penalties. *Apprendi*, 530 U.S. at 487. The *Apprendi* Court explained that a prior conviction is unlike other sentence-enhancing

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[4] This Court need not reconsider its holding in *Almendarez-Torres* to resolve the question presented. However, if the Court decides to do so, the validity of *Almendarez-Torres* could be deemed "fairly included" within the question presented. See Supreme Court Rule 14.1(a).

facts because "there is a vast difference between accepting the validity of a prior judgment of conviction entered *in a proceeding in which the defendant had the right to a jury trial* and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 496 (emphasis added).

Following *Apprendi*, courts have diverged over whether prior juvenile adjudications in which the defendant had no right to a jury trial fall within *Apprendi*'s "prior conviction" exception. In the decision below, the panel majority reasoned that proceedings in which the defendant received all procedural protections to which he was constitutionally entitled—even if those protections do not include a jury trial—are sufficiently reliable to meet *Apprendi*'s "prior conviction" exception. App., *infra*, 40a. The panel majority opined that juvenile defendants are afforded several other protections that "ensure" the "integrity of the fact-finding procedures," such as the rights to notice, counsel, and confrontation of witnesses, as well as the proof beyond a reasonable doubt standard. *Ibid.* But the panel majority concluded that because juveniles are not constitutionally entitled to a jury trial under *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), nonjury juvenile adjudications "are not subject to the *Apprendi* rule." *Ibid.* That ruling deepens a conflict over the issue among the federal and state courts.

The Seventh Circuit joined five federal appellate courts and five state supreme courts that have ruled that judges may increase a defendant's sentence beyond the statutory maximum based on a prior juvenile adjudication that did not include a jury trial

right. These courts also based their holdings on the presumed reliability of nonjury juvenile adjudications in light of other guaranteed procedural protections. See *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (procedural safeguards aside from the use of a jury "are more than sufficient to ensure the reliability that *Apprendi* requires"); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) ("A prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes."); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005) (a prior nonjury juvenile adjudication may be considered a prior conviction for *Apprendi* purposes where the defendant received "the totality of constitutional protections due"); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) ("Juvenile adjudications * * * provide sufficient procedural safeguards to satisfy the reliability requirement that is at the heart of *Apprendi*."); *United States v. Wright*, 594 F.3d 259, 264 (4th Cir. 2010) (a prior nonjury juvenile adjudication may be used for sentencing consideration where it is otherwise "constitutionally sufficient to commit a juvenile to confinement"). Accord *People v. Nguyen*, 209 P.3d 946 (Cal. 2009); *State v. Weber*, 149 P.3d 646 (Wash. 2006); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005); *State v. Hitt*, 42 P.3d 732 (Kan. 2002).

In contrast, the Ninth Circuit has flatly rejected the view that nonjury juvenile adjudications fall within *Apprendi*'s "prior conviction" exception. In *United States v. Tighe*, 266 F.3d 1187, 1192, 1194 (9th Cir. 2001), the court focused on the "significant constitutional differences between adult convictions and juvenile adjudications," and on the *Apprendi*

Court's explicit description of the fact of a prior conviction as a "narrow exception" to the general rule guaranteeing a jury trial right when sentence enhancements are at stake. The court viewed *Apprendi*'s prior conviction exception as "premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections—particularly the right to a jury trial and proof beyond a reasonable doubt." *Id.* at 1194. As such, the Ninth Circuit held that "the 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." *Ibid.*

The Louisiana Supreme Court likewise holds that under *Apprendi*, nonjury juvenile adjudications cannot be used to increase a defendant's sentence beyond the statutory maximum. In *State v. Brown*, 879 So. 2d 1276, 1288 (La. 2004), the court noted that juveniles receive fewer procedural safeguards than adults because "[u]nder the guise of *parens patriae*, juvenile courts emphasize treatment, supervision, and control rather than punishment" and the proceedings are "non-criminal or 'civil'" in nature. The court observed: "It seems contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults." *Id.* at 1289. "If a juvenile adjudication, with its lack of a right to a jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction for purposes of [sentence enhancement], then 'the entire claim of *parens patriae* becomes a hypocritical mockery.'" *Ibid.* The

court agreed with *Tighe*'s reasoning that the prior conviction exception applies only to "proceedings that afforded crucial procedural protections—particularly fair notice, the right to jury trial and proof beyond a reasonable doubt." *Id.* at 1290. Accordingly, the court held that nonjury juvenile adjudications "cannot be excepted from *Apprendi*'s general rule." *Ibid.*

The Oregon Supreme Court has adopted yet another interpretation of *Apprendi*. In *State v. Harris*, 118 P.3d 236 (Or. 2005), the court rejected the view that *Apprendi*'s "prior conviction" exception turns on whether the prior proceeding afforded the defendant sufficient procedural safeguards to ensure its reliability. The court noted that under this Court's precedents, "the jury's importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable fact finder." *Id.* at 243. "From the framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *Ibid.* The Oregon Supreme Court did not join *Tighe* and *Brown* in holding that the state must prove to a jury that the defendant actually committed the crime alleged in the juvenile adjudication to use it as a basis for sentence enhancement. However, the court rejected the view that such adjudications fall within *Apprendi*'s "prior conviction" exception and therefore need not even be presented to the jury in the adult criminal trial. Instead, the court held, "the Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its *existence* must either be proved to a trier of fact or be admitted by a defendant." *Id.* at 246 (emphasis added).

In short, there is a deep and persistent conflict among the circuits and state courts over use of prior nonjury juvenile adjudications for sentence enhancement purposes. The conflict is well entrenched, having existed for nearly a decade, and further percolation is unnecessary because the analytical issues have been fully explored. Only this Court can clarify the proper scope of *Apprendi*'s "prior conviction" exception.

B. The Ruling Below Conflicts With This Court's Sixth Amendment Precedents.

Review also is warranted because the Seventh Circuit's ruling conflicts with this Court's recent Sixth Amendment precedents and misapprehends the nature of juvenile proceedings. In holding that nonjury juvenile adjudications constitute "prior convictions" for purposes of the *Apprendi* rule, the Seventh Circuit eviscerated the distinction between juvenile proceedings and criminal trials. See *McKeiver*, 403 U.S. at 550 (juvenile proceedings should not be "equated" with criminal trials); *Schall v. Martin*, 467 U.S. 253, 263 (1984) ("The State has a *parens patriae* interest in preserving and promoting the welfare of the child, which makes a juvenile proceeding fundamentally different from an adult criminal trial") (citation omitted). Indeed, under Illinois law, a juvenile adjudication is not considered a "conviction" at all because it does not involve criminal proceedings. *In re W.W.*, 454 N.E.2d 207, 210 (Ill. 1983) ("[J]uvenile proceedings are not criminal in nature. As such, a minor is neither 'convicted' nor considered a 'defendant' or an 'accused.' Nor is a proceeding under the Juvenile Court Act denominated a 'conviction'").

The Seventh Circuit declined to consider the aspects of juvenile proceedings that differentiate them from criminal trials, such as their character and objectives, instead focusing exclusively on whether nonjury juvenile adjudications provide constitutionally adequate procedural safeguards. In the panel majority's view, *Apprendi*'s exception for "prior convictions" had nothing to do with the jury trial right, but was instead based on this Court's belief that "procedural safeguards surrounding such a conviction gave it sufficient reliability that further protections were not required." App., *infra*, 34a. On that basis, the court held that because nonjury adjudications were deemed sufficiently "reliable" to meet due process requirements for juveniles in *McKeiver*, they are not subject to the *Apprendi* rule. *Id.* at 40a.

The court's analysis ignores important considerations that compel the opposite result. First, it disregards the actual language of this Court's decisions. In explaining the reason for the "prior conviction" exception, the *Apprendi* Court emphasized that "there is a vast difference between accepting the validity of a prior judgment of conviction entered *in a proceeding in which the defendant had the right to a jury trial* and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." 530 U.S. at 496 (emphasis added). The Court previously had explained that the right to a jury trial made a prior conviction constitutionally distinct from other sentence-enhancing factors. "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense * * * a prior conviction must itself have been established through procedures satisfying

the fair notice, reasonable doubt and *jury trial guarantees*." *Jones v. United States*, 526 U.S. 227, 249 (1999) (emphasis added). As Judge Posner summarized in dissent, "the Supreme Court require[s] that any fact, as distinct from a conviction, used to enhance a sentence be a fact found by a jury." App., *infra*, 44a. The Seventh Circuit majority reduced this principle to a requirement "that a defendant must receive all the protections to which he is entitled." *Id.* at 40a. But as Judge Posner explained, if that is what the *Apprendi* Court meant, "[w]hy didn't the Court just say that the fact must be found by a reliable means?" *Id.* at 45a. *Apprendi* held that due process requires that *a jury* find beyond a reasonable doubt all facts necessary to enhance a defendant's sentence. That holding is irreconcilable with the notion that the "prior conviction" exception is totally divorced from the jury trial right.

The Seventh Circuit's analysis also ignores the reasoning on which *McKeiver* was based. *McKeiver* was premised on the idea that juveniles do not require the same procedural safeguards as criminal trials because juvenile courts are designed to provide "an intimate, informal protective proceeding" rather than a determination of criminal guilt. 403 U.S. at 545, 553. While conceding that the "fond and idealistic hopes" of the juvenile court system had not yet been realized, the Court was "particularly reluctant to say * * * that the system cannot accomplish its rehabilitative goals." *Id.* at 543, 547. The Court was especially concerned that "the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end" to the system's "idealistic prospect." *Id.* at 545.

The Court further assumed that a jury trial right "would not strengthen greatly, if at all, the fact-finding function." 403 U.S. at 547. Although some courts have seized on this language to rationalize the use of prior juvenile adjudications for sentence enhancements, they fail to come to grips with *McKeiver*'s reasoning. In *McKeiver*, lack of a jury trial right did not offend due process where an ostensibly protective system sought to rehabilitate juvenile delinquents and thus "the consequences of adjudication are *less severe* than those flowing from verdicts of criminal guilt." *Id.* at 553 (White, J., concurring) (emphasis added). The decision below turns *McKeiver* on its head in holding that such juvenile adjudications are sufficiently reliable to be used in the entirely different context of imposing *enhanced* penalties on adults. As Judge Posner observed:

> The constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for purposes of recidivist enhancements, to adult convictions.

App., *infra*, 46a.

Finally, in its exclusive focus on whether juvenile adjudications are reliable, the Seventh Circuit failed to appreciate that *Apprendi*'s emphasis on the procedural right to trial by jury encompasses constitutional concerns beyond mere due process reliability in fact-finding. *Apprendi*, and indeed this Court's entire body of Sixth Amendment precedents, also preserves the jury's role in protecting defendants

from government oppression through its traditional power of nullification. See *Apprendi*, 530 U.S. at 479 n.5 (juries have historically "devised extralegal ways of avoiding * * * the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct"); *Ring v. Arizona*, 536 U.S. 584, 607 (2002) ("The Sixth Amendment jury trial right * * * does not turn on the relative rationality, fairness, or efficiency of potential factfinders").

This question implicates the centrality of the jury system to our system of justice. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives *wholly from the jury's verdict*." *Blakely v. Washington*, 542 U.S. 296, 305-306 (2004) (emphasis added) (citations omitted). The ruling below confirms "the Framers' fears that the jury right could be lost not only by gross denial, but by erosion." *Apprendi*, 530 U.S. at 483.

C. The Constitutional Question Presented Is Of Great Importance To The Administration Of Criminal Justice.

The question whether nonjury juvenile adjudications are subject to *Apprendi* is a recurring issue involving "constitutional protections of surpassing importance." *Apprendi*, 530 U.S. at 476. The Seventh Circuit's extension of *McKeiver* to the adult sentence-enhancement context is particularly troubling in light of empirical studies that undermine its assumption that nonjury juvenile adjudications are as reliable as adult convictions. Research comparing judge and jury decision-making demonstrates mate-

rial differences in the fact-finding process. Although judges and juries often agree, "when they differ, juries are far more likely to acquit defendants than are judges given the same types of evidence." Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1162 (2003).

The data confirm that juries best protect the Sixth Amendment's guarantees. The fact that judges hear so many similar cases compromises accurate judicial fact-finding. As compared with juries, individual judges often engage in a more casual evaluation of the facts and application of the standard of proof; rely unduly on familiar police and probation officers who testify on a recurring basis; fail to compartmentalize inadmissible and prejudicial evidence; show less sympathy toward youthful defendants; and are influenced by biases that are otherwise counterbalanced through group deliberation. See *id.* at 1163-1169; Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 302-306 (2007). These differences matter. As Judge Posner reasoned:

> [I]f it is true that juvenile defendants fare worse before judges than they would before juries—if there is reason to think that trial by jury would alter the outcomes in a nontrivial proportion of juvenile cases—one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference.

App., *infra*, 47a-48a.

At present, juveniles have no right to a trial by jury in 37 states. Stephen F. Donahoe, *The Problem With Forgiving (But Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing*, 66 U. PITT. L. REV. 887, 904 n.109 (2005). Under the ruling below, adjudications in those states may be used to enhance later sentences, which typically lengthens them considerably. A record of a prior juvenile adjudication allows for sentence enhancements by over forty years in eleven states, by twenty to forty years in six states, and by up to twenty years in another seven states. Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 21 (2000). This case dramatically illustrates the impact. The court's use of petitioner's nonjury juvenile adjudication as an ACCA predicate resulted in a sentence that is double what it otherwise would have been.

The conflict among the lower courts results in enormous differences in the severity of sentences for criminal defendants. These unfair disparities require this Court's clarification of the scope of *Apprendi*'s "prior conviction" exception.

II. This Court Should Resolve Whether Vehicular Fleeing Is A "Violent Felony" Under The Armed Career Criminal Act.

The Court also should resolve the conflict over whether vehicular flight from a police officer is a "violent felony" under the ACCA in light of *Begay v. United States*, 553 U.S. 137 (2008). The panel majority held that vehicular fleeing is "purposeful, violent, and aggressive," and that a conviction for this offense therefore warrants a substantial sentence enhance-

ment designed for armed career criminals. The court interpreted the *Begay* requirements expansively, contrary to this Court's limitation of the ACCA to genuinely violent crimes. Moreover, the Seventh Circuit's reliance on a hypothetical risk of confrontation conflicts with *Chambers v. United States*, 129 S. Ct. 687 (2009), and decisions of other circuits. This Court should grant review to clarify the meaning of "violent felony" and ensure compliance with this Court's precedents governing sentencing under recidivist statutes.

A. Federal Appellate Courts Are Divided Over Whether Vehicular Fleeing Is A "Violent Felony" Under The ACCA.

The ACCA imposes severe sentence enhancements for unlawful possession of a firearm where the defendant has three prior convictions for "a violent felony," including any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e).

In *Begay*, this Court limited the meaning of "violent felony" to crimes that "are roughly similar, in kind as well as in degree of risk posed" to the sample offenses enumerated in the statute—burglary, arson, extortion, and crimes involving the use of explosives. 553 U.S. at 143. At issue in *Begay* was whether driving under the influence qualifies as a violent felony because it "presents a serious potential risk of physical injury to another." The Court held that risky conduct alone is not enough to make a crime a "violent felony," and that the offense must also involve "purposeful, violent, and aggressive conduct" to warrant sentence enhancement. *Id.* at 145. The Court looked to the Act's basic purpose—imposing heightened punishment on armed career criminals—to hold

that driving under the influence is not a "violent felony" within the meaning of the statute because it is "a crime of negligence or recklessness, rather than violence or aggression." *Id.* at 146. Moreover, it lacks the "deliberate kind of behavior" associated with a likelihood of future misuse of firearms. *Id.* at 147.

Since *Begay*, the lower courts have repeatedly confronted the question whether the ACCA and similar sentence enhancement statutes apply to fleeing or eluding a police officer. Four federal courts of appeals, including the Seventh Circuit below, have held that any vehicular fleeing offense is a violent felony. In contrast, the Eighth and Eleventh Circuits have held that vehicular fleeing does not constitute a violent felony when the offense does not involve high-risk factors.

The Seventh Circuit analogized fleeing to escapes from custody, stating that "vehicular fleeing necessarily involves affirmative action on the part of the perpetrator." App., *infra*, 30a. The panel majority described fleeing as "violent and aggressive" because "one who flees a police officer in a vehicle draws attention to himself, challenges the immediate authority of the police officer and calls on the officer to give immediate chase." *Id.* at 31a. The panel majority supported its holding by hypothesizing a likelihood of future misuse of a firearm: "An individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, [he] would have a greater propensity to use that firearm in an effort to evade arrest." *Id.* at 31a-32a.

Three other circuits similarly have focused on the alleged defiance of the fleeing offender and the

potential for violent confrontation with the officer. See *United States v. Wise*, 597 F.3d 1141, 1147 (10th Cir. 2010) (fleeing "poses the threat of a direct confrontation between the police officer and the occupants of the vehicle" and "will always involve an overt, rather than covert, disobedience of an officer's command");[5] *United States v. Young*, 580 F.3d 373, 377-378 (6th Cir. 2009) (fleeing involves "a clear challenge to the officer's authority" and "typically lead[s] to a confrontation between the offender and the officer"); *United States v. Harrimon*, 568 F.3d 531, 535 (5th Cir. 2009) ("Fleeing by vehicle * * * typically initiates pursuit [and] 'will typically lead to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of violence").

But two other circuits have rejected that focus on the defiance of the offender and risk of confrontation. In *United States v. Tyler*, 580 F.3d 722, 725 (8th Cir. 2009), the Eighth Circuit held that vehicular flight under Minnesota law is *not* a crime of violence because the statute at issue criminalized behavior that is "neither violent nor aggressive," such as "merely extinguish[ing] motor vehicle headlights or taillights." The court rejected the state's view that fleeing is violent and aggressive, noting "the elements of the statute do not require a confrontation, chase, or any other conduct indicating that the crime in question necessarily involves conduct presenting a seri-

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[5] *Wise* and several other decisions cited below consider whether vehicular fleeing is a "crime of violence" under Section 4B1.2 of the federal sentencing guidelines rather than a "violent felony" under the ACCA, but federal courts treat the definitions as identical. *E.g.*, *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008); *United States v. Serafin*, 562 F.3d 1105, 1113 n.9 (10th Cir. 2009).

ous risk of physical injury to another or conduct that is violent and aggressive." *Ibid.* In *United States v. Harrison*, 558 F.3d 1280, 1295 (11th Cir. 2009), the Eleventh Circuit likewise rejected the argument that disobedience of an officer's command was enough to treat vehicular fleeing—at least in its unaggravated form—as a violent felony. "[D]isobeying a police officer's signal and continuing to drive on, without high speed or reckless conduct, is not sufficiently aggressive and violent to be like the enumerated ACCA crimes." *Ibid.* The court found the comparison of fleeing to escape inapt, observing that "*Chambers* rejects the notion that all escapes are created equal." *Ibid.*

As the growing number of decisions in the lower courts indicates, a prior conviction for vehicular fleeing is frequently used as a predicate offense to increase defendants' sentences under the ACCA and other similar sentence enhancement statutes.[6] Resolving the question whether fleeing an officer is a "violent felony" under the ACCA would therefore affect many criminal cases. The circuit split has resulted in intolerable disuniformity. A defendant's sentence may be enhanced by over five years for extinguishing her headlights upon being signaled to stop in one circuit but not another. As Judge Posner

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[6] For example, since *Begay* was decided, the Seventh Circuit alone has confronted this issue at least seven times and held that vehicular fleeing is a "violent felony" or a "crime of violence" in each case. See *United States v. Womack*, 610 F.3d 427 (7th Cir. 2010); *United States v. Dunson*, 603 F.3d 1023 (7th Cir. 2010); *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010); *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010); *United States v. Jennings*, 544 F.3d 815 (7th Cir. 2008); *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008).

urged, this Court should resolve this issue. App., *infra*, 52a.

B. The Seventh Circuit's Holding That Vehicular Fleeing Qualifies As A "Violent Felony" Contravenes This Court's ACCA Precedents.

As Judge Posner's dissent explains, the panel majority's reasoning is in error. While vehicular flight may present a risk of injury to others in some circumstances, it is not inherently "purposeful, violent, and aggressive" like the enumerated offenses of the residual clause. Moreover, the panel majority's emphasis on the mere possibility of confrontation upon termination of the pursuit is inconsistent with *Chambers v. United States*, 129 S. Ct. 687 (2009), where this Court reversed a Seventh Circuit ruling that *any* form of escape is categorically a crime of violence.

To begin with, fleeing is not "purposeful" as *Begay* used the term to classify a "violent felony." The enumerated crimes have a commonality in their "purposefulness" that exceeds mere intentional engagement in unlawful conduct. Each crime has *as its purpose* the infliction of harm, either to persons or property, which in turn makes it more likely that the offender would be willing to "use [a] gun deliberately to harm a victim." *Begay*, 553 U.S. at 145 ("burglary is an unlawful or unprivileged entry into a building or other structure with intent to commit a crime[;] arson is causing a fire or explosion with the purpose of, e.g., destroying a building * * * of another or damaging any property * * * to collect insurance[;] extortion is purposely obtaining property of another through threat of, e.g., inflicting bodily injury[;] the word 'use' [with respect to explosives] most naturally

suggests a higher degree of intent than negligent or merely accidental conduct") (internal quotation marks and citations omitted). As Judge Posner explained, "[g]iven that the purpose of the catch-all provision in the Armed Career Criminal Act is to enable courts to identify crimes that are similar to the enumerated ones, 'purposeful' should be interpreted to mean trying to harm a person's person or property, which is characteristic of the enumerated crimes." App., *infra*, 50a.

A fleeing suspect does not act with the purpose of causing harm to others. Rather, fleeing is a defensive action in which the offender's only objective is to avoid being detained by the police. In that sense, it is like escape, where the offender's "mental state is only intent to be free of custody, not intent to injure or threaten anyone." *United States v. Templeton*, 543 F.3d 378, 383 (7th Cir. 2008). In this respect, fleeing can be compared to "failure to report" offenses and "walkaway escapes," which courts have held are *not* violent felonies. See *ibid.*; *Chambers*, 129 S. Ct. at 687; *United States v. Lee*, 586 F.3d 859, 868-874 (11th Cir. 2009); *United States v. Hopkins*, 577 F.3d 507, 512-515 (3d Cir. 2009); *United States v. Charles*, 576 F.3d 1060, 1066-1069 (10th Cir. 2009). Although fleeing entails a greater degree of risk to others, the *Begay* Court rejected the argument that the dangerousness of a person's conduct—where otherwise "far removed * * * from the deliberate kind of behavior associated with violent criminal use of firearms"—suffices "to create an element of intent," even when engaged in knowingly. 553 U.S. at 145, 147.

The Seventh Circuit also erred in characterizing vehicular fleeing as "violent and aggressive." The panel majority reasoned:

> [O]ne who flees a police officer in a vehicle draws attention to himself, challenges the immediate authority of the police officer and calls on the officer to give immediate chase. Whether the officer accepts that invitation, the perpetrator takes action to elude capture with his vehicle, action that, by its very nature, endangers others.

App., *infra*, 31a. The court effectively shoehorned the fleeing offense into the definition of a "violent felony" by suggesting the offender displays an attitude of hostile defiance and actually *seeks* a pursuit. But panic-induced disobedience is quite different from aggression. Ordinarily, the fleer hopes that the officer will *not* give chase and *not* put himself at risk—his operative motive is simply to get away. That the officer is likely to pursue him regardless of the fleer's subjective intentions does not transform the flight into a violent and aggressive act. Moreover, as Judge Posner observed, defiance of authority is characteristic of many types of conduct that are hardly violent and aggressive, such as failure to report to prison and walkaway escapes (and indeed civil disobedience). App., *infra*, 51a-52a. The panel majority's elastic use of "violent" and "aggressive" cannot blur the plain distinction between the genuinely violent conduct targeted by the ACCA and the merely reckless behavior excluded by *Begay*.

The Seventh Circuit also pointed to the possibility of a violent confrontation upon termination of the pursuit if the fleer possesses a firearm. App., *infra*, 31a-32a. But this Court in *Chambers* rejected the state's use of similar conjecture to correlate the mindset of a failure-to-report offender with the conduct targeted by the statute. 129 S. Ct. at 693 (of-

fenders are not significantly more likely to attack or physically resist police apprehenders given government data "show[ing] only a small risk of physical violence"). Here, too, the court below assumed that "every escape scenario is a powder keg," a rationale that *Chambers* flatly rejected.

Moreover, the likelihood that fleeing offenders will engage in violent conduct appears to be relatively low. In a survey of offenders who fled from police, 32 percent said they fled because they were driving a stolen car, 28 percent said they fled because they were driving with a suspended license, 22 percent said they fled because they were driving under the influence, and 17 percent said they fled because they possessed drugs. Geoffrey P. Alpert, et al., POLICE PURSUITS: WHAT WE KNOW 122 (2000). Police agency data show that the majority of pursuits are initiated because of minor traffic offenses and suspected DUI. James H. Auten, AN ANALYSIS OF POLICE PURSUIT DRIVING OPERATIONS: AN OVERVIEW OF THE RESULTS 36-37 (U. of Ill. Police Training Institute 1994); Geoffrey P. Alpert, et al., *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599, 607-621 (1997). These statistics undermine any assumption that the typical offender is likely to be a dangerous felon. As a leading expert on police pursuits observed:

> [M]ost suspects flee the police to avoid apprehension because they are frightened and do not want to face the consequences of the charges the police could bring against them. * * * [O]ur data show that many suspects flee because they are afraid, or are just

> making an irresponsible decision, not because they have committed a serious crime.

Alpert, POLICE PURSUITS, *supra*, at 159-160. Petitioner's own reason for fleeing is consistent with this typical scenario: after being signaled to pull over because police observed him speeding, Welch fled because he did not have a valid driver's license. S.R. 20 ¶ 29.

As the Eleventh Circuit concluded, a typical fleeing offender "is not, in our mind, cut from the same cloth as burglars, arsonists, extortionists, or those that criminally detonate explosives. The fleeing crime in [Florida's statute] seems more appropriately characterized as the crime of a fleeing coward—not an armed career criminal bent on inflicting physical injury." *Harrison*, 558 F.3d at 1296. Much like driving under the influence, vehicular fleeing may present a potential risk of physical injury to another, but fright in flight is not comparable to the type of violent crimes committed by armed career criminals for which Congress intended heightened punishment.[7]

Review of the decision below will provide this Court with an opportunity to clarify the scope of the *Begay* standard. Lower courts have struggled over the meaning and application of the "purposeful, violent, and aggressive" framework. *E.g.*, *United States*

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[7] To the extent there is any doubt regarding the ACCA's application to vehicular fleeing, the rule of lenity should apply. See *Ladner v. United States*, 358 U.S. 169, 178 (1958) ("the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended").

v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008) (*Begay*'s "violent and aggressive" standard "used language subject to varying interpretations" and "the Supreme Court did not define those terms or explain in other than conclusory terms why a DUI was not violent or aggressive"); *United States v. Woods*, 576 F.3d 400, 413 (7th Cir. 2009) (Easterbrook, J., dissenting) (it may be "easy to tell when a person's *conduct* was violent and aggressive, but whether a crime of conviction entails such conduct can be tricky, because it is necessary to think through the many varieties of behavior within a law's domain. States did not write their statutes with *Begay* in mind"). This case offers an ideal opportunity to clarify the meaning of "violent felony" as defined in *Begay*.

Accordingly, this Court should accept Judge Posner's invitation to explain how to apply *Begay*'s "purposeful" requirement in this context. "Adopting a rule that would exclude from the category of 'violent felony' a crime that while it may be dangerous does not involve any intention of harming anyone would go some distance toward clarifying the meaning of 'violent felony.'" App., *infra*, 52a. Such a rule not only would lead to more consistent and equitable outcomes in criminal proceedings, but also would reduce "the avalanche of litigation" over the ACCA's application in light of *Begay*. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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